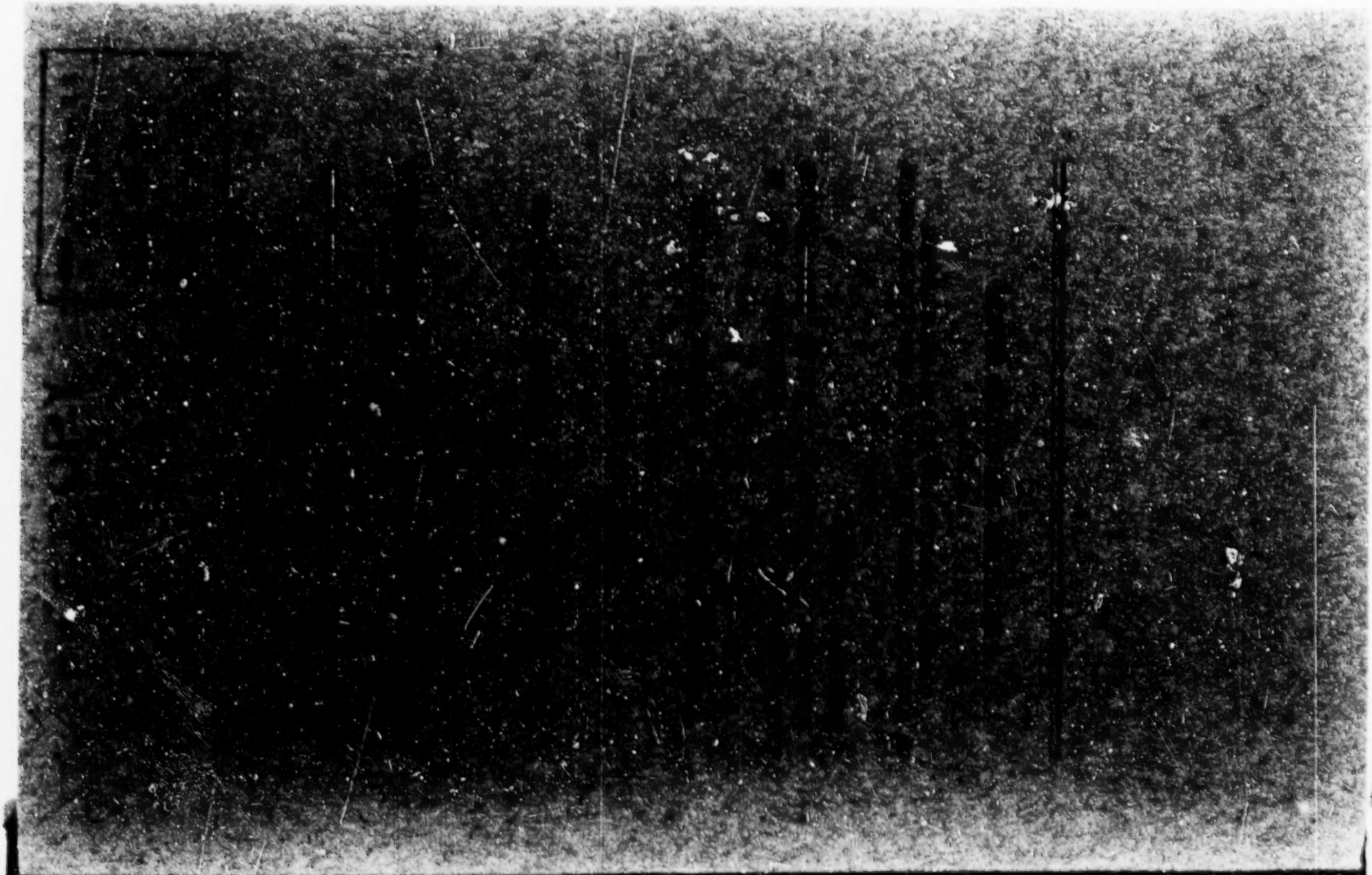

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 799

THE UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM R. JOHNSON

No. 800

THE UNITED STATES OF AMERICA, PETITIONER

v.

JACK SOMMERS, JAMES A. HARTIGAN, JOHN M. FLANAGAN,[1] WILLIAM P. KELLY AND STUART SOLOMON BROWN

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the court below (1 R. 180–221), and the opinion on

[1] Upon information, we are satisfied that Flanagan is now dead and suggest that the petition may be dismissed as to him.

[2] The record in this case consists of four volumes which will be referred to as 1 R., 2 R., 3 R., and 4 R., respectively.

rehearing (1 R. 231) are reported at 123 F. (2d) 111.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered September 15, 1941. (1 R. 222.) A petition for rehearing was denied on November 6, 1941. (1 R. 232.) The petition for writs of certiorari was filed on December 12, 1941, and was granted February 2, 1942. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

QUESTIONS PRESENTED

The respondents were convicted of criminal violations of the income-tax laws. The court below reversed upon a variety of grounds which appear to raise the following principal questions:

1. Whether the indictment or any part thereof was void.

2. Whether it was incumbent upon the Government to offer proof in support of the allegation of the indictment that the grand jury was properly continued.

3. Whether any of the counts were duplicitous or invalid by reason of inconsistency.

The first volume contains the pleadings, opinions, etc. The second and third volumes comprise the bill of exceptions. The fourth volume contains a transcript of certain testimony, that was added to the other three volumes by an order amplifying the record while this case was pending below.

4. Whether the evidence sustained the convictions.

5. Whether the examination of the expert witness Clifford invaded the province of the jury.

STATUTES INVOLVED

The relevant provisions of the statutes involved are set forth in the Appendix, *infra*, pp. 60–62.

STATEMENT

The respondents and others were indicted on five counts. The first four counts charged the defendant Johnson with wilful attempts to defeat and evade a large part of his income taxes for the calendar years 1936–1939, inclusive, and charged the other defendants with aiding and abetting Johnson's attempts to evade. The fifth count charged all of the defendants together with conspiracy to defraud the United States of Johnson's income taxes for those years.[1] (1 R. 2–25.)

Although Johnson did report substantial amounts of income for each of the years in controversy, the indictment charged that he had in fact received a vast amount in excess of what he had reported.[2]

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[1] Upon motion of the United States Attorney, the cause was dismissed as to four of the defendants. (1 R. 143.)

[2] Thus, for the year 1936, Johnson reported net income of $161,892.74, whereas the indictment charged that his net income for that year was $605,825.54 (R. 3, 5). For the year 1937, he reported net income of $248,660.18, whereas he was charged with receiving $880,866.20 net income (R. 7, 8). For

The theory of the prosecution was that Johnson was the owner of a number of gambling houses in and around Chicago[3] from which he derived large amounts of income which he failed to report, and that other respondents posed as the owners of the places, thereby concealing Johnson's financial interest in them.[4] The Government undertook to show that the various gambling houses, although ostensibly separately owned, were operated as a

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the year 1938, he reported net income of $101,946.68, whereas he was charged with receiving $959,356.60 net income (R. 11, 12). And for 1939 he reported net income of $251,715.47, whereas he was charged with receiving $931,566.90 net income (R. 14, 15).

[3] The indictment specifically named some twenty-five separate houses, twenty-one of which were identified by the following names (1 R. 19):

The Horse-Shoe Club	The Western Club
The Casino Club	The Select Club
The Dev-Lin	The Mayfair Club
The Lincoln Tavern	The Northland Club
The Harlem Stables	The Club Proviso
The House of Niles	The 4011 Club
The D. & D. Club	2135 Lake Park Club
The Bon-Air Casino	The Harlem Club
The Villa Moderne	The 11901 Vincennes Club
The 4020 Club	The 406 Club
The Southland Club	

[4] Thus the defendant Sommers stated that he owned the Horseshoe Club and the Dev-Lin Club (2 R. 467). Hartigan stated that he owned the Harlem Stables. (2 R. 462.) The defendant Wait testified that Hartigan owned the Lincoln Tavern. (3 R. 896.) Flanagan testified that he owned the 4020 Club, a place at 21[illegible] South Pulaski Road and a handbook service bureau at 2135 South Pulaski (3 R. 931–932.) Keily stated that he owned the D & D Club. (2 R. 458.)

unit, and that Johnson was so identified with them as to prove that he was the true owner.

That the gambling houses were operated as a unit was amply disclosed by the evidence. It was shown that horse racing information was furnished to the houses through a central clearing house which in turn purchased the information from the Nationwide News Service or its predecessor under a single account. (2 R. 151–162, 174–180.) The houses were inter-connected through the clearing house by a private telephone exchange. Each house had both one-way broadcasting service to carry the racing news and a two-way connection. The telephone service was carried by the telephone company as a single account. (2 R. 195–215, 174–180.)

Furniture and equipment were interchanged between the houses. One mover made the transfers. He carried the business as a single account. (2 R. 132–134, 265–271.) The same construction crew made alterations and repairs at the houses. (2 R. 128–132, 235–240.)

Bus service was provided to the various houses from pick up points and between the houses. A single bus company provided the service to the different houses and carried the business as a single account. (2 R. 306–307, 315–316, 388–390.) The drivers of private cars were hired to drive customers to and between the clubs. (2 R. 249, 250–251, 297, 381–382, 389–390.)

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The various respondents acted as bosses or managers at houses other than the houses which they had stated they owned. Witnesses described them as acting as day or night shift bosses or as acting as boss when another was absent. (2 R. 174–192, 293–303, 309–312, 316–317, 322–323, 324–326, 326–327, 333–334, 345–348, 350–364, 383–385, 387, 396–400, 3 R. 566–573.)

Employees were interchanged among the houses. Many witnesses testified that they were directed to change from house to house by the various respondents and to houses other than the houses named by the particular respondent as owned by him. (2 R. 250–251, 254–256, 293–299, 316–317, 322–323, 324–326, 326–327, 328–329, 337–338, 387, 396–400.) A school at which "dealers" were taught their art was operated at the Horseshoe Club, and was attended by employees of the other houses as well as those working at the Horseshoe. (2 R. 383–385.)

A further link which connected the operations of the gambling houses was the use of a so-called currency exchange which furnished private banking facilities for the houses. That business, formerly conducted by Sommers, Kelly and apparently Hartigan, at the "Albany Park Currency Exchange" in a single account (2 R. 476–500), was later transferred to the "Lawrence Avenue Currency Exchange" operated by Brown, and was there transacted through a single account. (2 R. 542–543; 3 R. 587–589, 595–598, 620.)

Johnson was identified with the houses in a variety of ways. He admitted ownership of the buildings in which the 4020 Club, 2141 South Pulaski Road, and the D & D Club were located and he was shown to be the owner of the building in which the Lawrence Avenue Currency Exchange was located. (2 R. 57, 410–418; 3 R. 950.) Johnson installed air conditioning in the D & D Club at a considerable expense to himself without increasing the "rent." (2 R. 16–25, 39–44.) The construction crew which worked on the gambling houses worked on the Bon Air Country Club, shown to be owned by Johnson, and on Johnson's farm. (2 R. 128–132, 235–240.)

A number of witnesses testified to direct acts of ownership and control by Johnson. A manager of the Nationwide News Service testified that Johnson and he discussed the rates on the racing information account and that Johnson stated that his rates should be lower than rates charged other bookmakers because customers were drawn into his places by other gambling games. (2 R. 151–162.) Johnson ordered an accountant to install an accounting system at the Lincoln Tavern. (2 R. 305.) Johnson offered to repay the loss of a customer at the Dev-Lin Club after a dispute about "crooked" dice. (2 R. 379–380.) A customer at the Horseshoe Club testified that she complained to Sommers about a reduction in the limit on betting, that Sommers told her she would have to see Johnson, that she saw Johnson and that Johnson

said he would get in touch with Sommers and have the limit restored. (3 R. 566–567, 573.)

Johnson personally paid the claims of two witnesses who had operated a tavern at the Harlem Stables prior to the opening of the gambling house and who had been forced out to make way for the gambling house. (2 R. 283–293.) Johnson likewise paid the claims for unpaid wages of employees of the prior owners. (2 R. 472–476.)

Johnson employed or was instrumental in the employment of numerous men at the various gambling houses. (2 R. 222–224, 225–229, 276–278, 309–312, 315–316, 322–323, 328–329, 387, 396–400.) One employee testified that Johnson told Sommers he wanted the witness to go to work, that Johnson had fired him years previously and that Johnson stated to Sommers at the time of rehiring that "this is one of our good men that couldn't behave himself." (2 R. 176–178.) Another employee described Johnson as walking around the gambling houses at which the witness worked acting "like the head of the house." (2 R. 348–373.) The same witness testified that on one occasion Johnson obtained additional employment for him and that in the course of the conversation Johnson said, "I am running gambling houses." (2 R. 351; cf. 3 R. 997.)

Johnson's income tax returns and those of the other defendants and of many of the employees were prepared by the same accountants. Johnson changed accountants for the 1936 and subsequent returns at the time when the other defendants

changed. (2 R. 106–114, 420–454.) The accountant who prepared the 1935 and prior returns testified that in 1932 he told Johnson of a Treasury drive on persons receiving income from illegal gains and suggested that if Johnson had any men or employees it would be well for them to file returns, that he was later called to the Horseshoe where Johnson introduced Sommers as "Meet my man Sommers" and asked the witness to repeat the information about filing returns. (2 R. 419–457.) The witness further testified that at the conversation with Johnson and Sommers, it was stated that Johnson's name was not to appear on the returns as the employer. (2 R. 423.)

Johnson's relative position in the conspiracy was further shown by statements to various witnesses made by the other defendants. Hartigan warned employees not to say they were working for Johnson. (2 R. 355–356.) Sommers told the manager of the Albany Park Currency Exchange that the business was being transferred to the Lawrence Avenue Currency Exchange because Brown was a tenant in their building. (2 R. 477.) Brown described the account in the Lawrence Avenue Currency Exchange, otherwise identified as the Gambling houses account, as the Johnson account and that the source of the funds was Johnson. (2 R. 535–537.) Sommers told a customer at the Horseshoe who requested a loan that he would have to get in touch with the boss, and after telephoning and making the loan he told the customer that

Johnson was the big boss. (3 R. 545–546.) Sommers told customers at a gambling table at the Horseshoe that if they had any complaints they would have to make them to Johnson. (3 R. 567–568, 571.)

No permanent books or records[7] of gambling profits were kept and the income of the houses was necessarily shown from currency and check transactions at banks and currency exchanges. (2 R. 467–469, 476–499, 503–510, 532–543; 3 R. 552–554, 559–566, 603–605, 606–607, 611–612, 694.) The fact that Johnson's actual income was greatly in excess of income reported was confirmed by the Government's showing that during each of the years in question except 1936, Johnson purchased various properties and made other expenditures aggregating far more than his available resources as evidenced by his admitted assets and reported income. (2 R. 10, 11–13, 56–67, 81–84, 90–92, 122, 140, 142–145, 168–170, 228–232, 260–261, 274, 313, 392–393, 411; 3 R. 976; 4 R. 13–15, 18–27.)

Three of the co-defendants were acquitted, but Johnson and the other respondents were found guilty.[8] Johnson was sentenced to five years im-

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[7] Although a bookkeeping system was employed in many of the houses, most of the records were systematically destroyed within a few days or weeks after they had been made. (2 R. 178–179, 256–258, 373–374, 412–418, 459, 469; 3 R. 710–711, 767–768, 788, 818–819, 823–827, 849, 885–886, 933–934, 939–941, 948, 995.)

[8] Johnson, Sommers, Hartigan, Flanagan, and Kelly were found guilty on all five counts; Brown was found guilty only on the third, fourth, and fifth counts.

prisonment and fined $10,000.[9] The other respondents were given lesser concurrent sentences and fines. (1 R. 154–162.)

The Circuit Court of Appeals, Judge Evans dissenting, reversed the judgments. The majority opinion appears to base the reversal upon the following considerations:

1. The court held that the entire indictment was void in that it was not returned by a legally constituted grand jury by reason of an allegedly invalid order of continuance. The grand jury was impaneled during the December 1939 term of the District Court of the Eastern Division of the Northern District of Illinois.[10] (1 R. 2, 28, 32.) By order dated January 24, 1940, during the December term, the grand jury was authorized to sit during the February 1940 term to finish investigations begun but not finished during the December term. No question is raised as to the legality of the grand jury as originally impaneled or as continued into the February term. On February 28, 1940, the District Court entered a further order extending

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[9] He was sentenced to imprisonment for five years on each of the first four counts and two years on the fifth count, the terms to run concurrently; he was fined $10,000 on each count, but with the provision that payment of one $10,000 fine should discharge all fines (1 R. 154–155).

[10] Section 79, Judicial Code, as amended (U. S. C., Title 28, Sec. 152) provides that the terms of the District Court for the Eastern Division of the Northern District of Illinois shall be held on the first Monday in February, March, April, May, June, July, September, October, and November, and the third Monday in December.

the life of the grand jury into the March term, reading as follows [11] (1 R. 28–29, 32–33):

> Now comes the Second December Term 1939 Grand Jury for the Northern District of Illinois * * * and * * * requests that an order be entered authorizing them, the said Second December, 1939 Grand Jury, heretofore authorized to sit during the February 1940 Term of this Court, to continue to sit during the Term of Court succeeding the said February Term of Court, to-wit, the March 1940 Term of Court, to finish investigations begun but not finished by said Grand Jury during the said December 1939 and the said February 1940 Terms of this Court, and which said investigations cannot be finished during the said February 1940 Term of Court; * * *
>
> It is Therefore Ordered That the Second December 1939 Grand Jury, now sitting in this Division and District, be, and it is here-

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[11] Both the January 24 and the February 28 orders of continuance were based upon Section 284, Judicial Code, as amended by the Act of August 24, 1937, c. 746, 50 Stat. 748 (U. S. C., Title 28, Sec. 421), which provides:

"* * * A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than three terms. * * *"

These provisions were subsequently amended by the Act of April 17, 1940, c. 101, 54 Stat. 110, by changing the words "three terms" to "eighteen months."

> by authorized to continue to sit during the March 1940 Term of Court for the purpose of finishing said investigations.

The indictment was returned on March 29, 1940, during the March term, and its preamble alleged (1 R. 2):

> The Grand Jurors * * * at the December Term * * * having begun but not finished during said December Term of Court among other things an investigation of the matters charged in this indictment, and having continued to sit by order of this Court * * * during the February and March Terms of said Court for the purpose of finishing investigations begun but not finished during said December Term of Court * * *

Johnson filed a motion to quash the indictment (1 R. 28–31) and the other defendants filed a plea in abatement "in the nature of a motion to quash" (1 R. 32–35), in each of which it was charged in substantially identical language that the order continuing the grand jury into the March term was void. The Government moved to strike the plea in abatement (1 R. 43), and thereafter the defendants moved for a rule on the Government to reply to such plea and motion (1 R. 44). The District Court denied the motion for a rule on the Government, overruled the motion to quash, and granted the Government's motion to strike the plea in abatement (1 R. 45–46). The court below, how-

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ever, held that the motion to quash and the so-called plea in abatement should have been sustained. In reversing the judgments it held that the order continuing the grand jury into the March term was void, on the ground that it authorized the grand jury to continue investigations begun in the February term whereas under the statute the grand jury could be continued only to complete investigations begun in its original term, i. e., the December term.

2. The court held further that even if the order of continuance were valid, Johnson's motion to quash and the other defendants' plea in abatement alleged facts showing that the grand jury had completed its investigations in February, that it in fact considered new matters during the March term, and that the Government should have been required to answer. The allegedly new matters related to Johnson's 1939 income taxes, the returns for which were filed during March 1940. (1 R. 186–187.)

3. Although the indictment itself alleged that the grand jury continued to sit during the February and March terms for the purpose of finishing investigations begun but not finished during the December term (1 R. 2), the court held that such allegations standing alone were insufficient and that it was incumbent upon the Government to offer proof in support thereof: "Failure of proof

with reference to the allegation under discussion is, in our opinion, fatal to the judgment." (1 R. 190.)

4. The court below also ruled that the first four counts of the indictment were duplicitous and inconsistent as to the respondents other than Johnson, in that Johnson was charged with a substantive crime committed on March 15 of each of the years in question whereas the aiders and abettors were charged with a crime consisting of a course of conduct over a period of time. The court held the first four counts were further demurrable since, in its view, the codefendants were charged as accessories both before and after the fact in each count. (1 R. 190–192.)

5. As to the first count, involving the year 1936, the court held that the evidence did not support the charge and that Johnson's motion for a directed verdict should have been allowed. It also held that the motion for a directed verdict on behalf of the co-defendants should have been granted as to the first four counts, since, in its view, there was no evidence that the co-defendants had anything to do with the preparation of Johnson's returns. (1 R. 193–196.)

6. Finally, the court held that the testimony of an expert witness, Internal Revenue Agent Clifford, invaded the province of the jury since the questions relating to Johnson's income and taxes were not hypothetical in form. (1 R. 198–200.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the grand jury was not lawfully constituted in that the order of the District Court extending its sitting to the term at which the indictment was returned was void.

2. In holding that Section 556 of Title 18, United States Code (Section 1025, Revised Statutes, as amended), did not apply to cure any asserted defect in the grand jury proceedings, or any other alleged error or defect occurring in this case.

3. In holding that the demurrers should be sustained as to the fourth count on the ground that the grand jury was only authorized to investigate completed offenses completed at or prior to the original term.

4. In holding that the respondents' motion to quash and plea in abatement were sufficient to require the Government to answer.

5. In holding that the failure of the Government to prove the allegation in the indictment as to the continuance of the grand jury was fatal to the judgment.

6. In holding that the substantive counts of the indictment were demurrable as to the respondents other than Johnson since they were inconsistent and duplicitous in that:

> (a) They charged aiding and abetting at times other than the alleged time of the commission of the principal offense by Johnson;

(b) They charged the respondents other than Johnson as accessories both before and after the fact.

7. In holding that directed verdicts for the respondents other than Johnson should have been granted as to the substantive counts on the ground that there was no evidence that these respondents had assisted in the preparation of Johnson's returns or had any knowledge as to their contents, and in holding that a directed verdict should have been granted for Johnson as to the first count.

8. In holding that the testimony of an expert witness for the Government invaded the province of the jury and constituted reversible error.

9. In reversing the judgments of the District Court.[12]

SUMMARY OF ARGUMENT

I

A. The court below erred in holding void the order of February 28, 1940, continuing the grand jury into the March term. Section 421, Title 28, U. S. C. (Sec. 284, of the Judicial Code) permits the District Court to authorize any grand jury to continue to sit after its original term, "solely to

[12] We contend that the court erred in reversing the convictions on every ground, however framed; and we have attempted to enumerate all of them in the foregoing specification of errors. However, since the discursive character of the majority opinion makes it difficult to isolate each ground with precision, the foregoing enumeration is not intended in any way to limit our attack upon the judgments below.

finish investigations begun but not finished by such grand jury". The legislative history and the general purpose of these provisions make clear that they were intended simply to limit the grand jury to a single general subject and to prevent it from continuing to sit for ordinary unrelated matters.

The grand jury herein was impaneled during the December 1939 term which ran through the month of January. On January 24, 1940, its existence was continued into the February 1940 term by an order of undisputed validity. On February 28, 1940 the District Court entered a second order, continuing the grand jury into the March 1940 term, and the indictment herein was returned during the March term. It is that order of February 28 which is here challenged and which the court below held void on the ground that it empowered the grand jury to continue not only the investigations begun at its original term but also any investigations begun at the February term.

We submit that the court misconstrued the order of February 28. The grand jury had no authority to begin, nor is it even suggested that it did begin, any new investigations in February. And, as disclosed by the record as well as by the solemn statement of the grand jury itself in the preamble to the indictment, the investigations herein were begun in the December term. When construed in its appropriate setting, the order of February 28 did not give the grand jury any excessive authority.

Moreover, even if the order did theoretically confer any excessive authority upon the grand jury, this indictment was the product of investigations conducted within permissible limits. Accordingly any possible defect in that order was cured by Sec. 556, Tit. 18, U. S. C. (Sec. 1025 of the Revised Statutes), which provides that "No indictment * * * shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant * * *". In rejecting the application of these provisions the court below relied simply upon *Crain* v. *United States*, 162 U. S. 625, which has been overruled by this Court on this issue. See also Section 269 of the Judicial Code.

B. The court ruled further that even if the order extending the grand jury into the March term were valid, the grand jury exceeded its authority as to count four and possibly count five to the extent that it dealt with Johnson's 1939 taxes. It held that since the income tax returns for 1939 were filed on March 15, 1940, the grand jury must have begun new "investigations" in March in order to indict with respect to the 1939 taxes. That ruling, however misconceives the meaning of the word "investigations". Congress employed the word, not in its narrow sense of specific offenses, but rather in its usual sense relating to a general inquiry into

a set of facts. Here the grand jury had undertaken to investigate Johnson's financial affairs and his income tax liability. It found a continuous pattern of conduct whereby persons other than Johnson posed as the owners of his gambling houses thereby enabling him to conceal the profits which he derived therefrom. The crime committed with respect to his 1939 taxes was just as much part of the central inquiry as were the crimes relating to the other years. In considering the 1939 taxes the grand jury entered upon no new "investigations" as that word is used in the statute.

C. Assuming the validity of the order of continuance, the allegations of the motion to quash and plea in abatement were insufficient to raise any further issue of fact relating to the grand jury's compliance with the order. Those preliminary motions alleged no specific facts that were legally sufficient to upset the first three counts, and the allegations as to the fourth and fifth counts dealt only with the fact that the returns for 1939 had been filed on March 15, 1940. But, as indicated above, that fact does not show that the grand jury acted improperly. The District Court correctly disposed of these preliminary motions against the defendants, and the court below erred in holding that the Government should have been required to answer. No specific facts and no facts from which prejudice might be inferred were alleged;

both are fundamental to the sufficiency of preliminary motions.

D. The decision of the court below not only requires the Government to answer the preliminary motions but goes further and imposes upon the Government the extraordinary burden of proving the formal allegations of the indictment as to the continuance of the grand jury. Its decision in this regard is contrary to long established practice that the burden of proof with respect to such preliminary matters is always upon the defendant. And if the court's decision is to be interpreted as imposing that burden upon the Government at the trial on the merits even in the absence of any preliminary motions, it is a radical departure from settled criminal practice.

II

A. The indictment charged Johnson with wilful attempts to evade income taxes as of March 15th of the various years and charged the other defendants with aiding and abetting the attempted evasion over a period of time. The essence of the crime charged against Johnson was the attempt to evade, not the mere filing of a false return. The attempted evasion, therefore, could be aided by acts unconnected with the filing of the false return. This is in accordance with the universally held interpretation of Section 332 of the Criminal Code which defines aiding and abetting. The co-defend-

ants were shown to have performed acts knowingly in furtherance of the common plan for evasion and the verdicts of conviction as to them are supported by the evidence.

The commission of a crime itself and the aiding and abetting of the crime are a single offense and not separate offenses. The dates alleged in the indictment other than the March 15th date are times of aiding and abetting and not times of the commission of separate offenses. The indictment, therefore, was not inconsistent as to the aiders and abettors.

B. Under a proper interpretation and correlation of Section 332 of the Criminal Code, defining aiding and abetting, and Section 333 of the Criminal code, fixing the punishment for accessories after the fact, a defendant who aids and abets the commission of a crime is a principal and his continued participation after the commission of the crime does not reduce him from a principal to an accessory after the fact. Here the aiders and abettors were charged only as principals. They were not prosecuted as accessories after the fact, and the charge to the jury placed no such issue before it. There was in fact no duplicity, and even a theoretical possibility of duplicity could not have prejudiced the defendants in the circumstances of this case.

III

The prosecution proceeded in part on the theory that Johnson was the owner of various gambling

houses and was entitled to all of the income therefrom. The evidence raised sharply defined issues of veracity of witnesses and weight of evidence. Such issues were for the jury to decide and the court below in holding the evidence insufficient to show Johnson's ownership has improperly substituted its views on these questions for the views of the jury.

IV

An expert witness for the prosecution, Clifford, an Internal Revenue Agent, was asked for a computation of net income and tax due from Johnson based upon exhibits previously introduced and upon the other evidence in the record. The court below held that the questions were not hypothetical in form and that the District Court therefore committed prejudicial error in admitting Clifford's testimony. We submit that the testimony was proper.

The fundamental requirement of a hypothetical question is simply that the premises used by the witness as the basis for his conclusion be expressly stated so that the jury may reject the conclusions if it finds that the premises are not true. The form of the hypothetical question rests largely with the discretion of the trial court and the only fixed requirement of form is that the jury be not misled as to the premises used.

The entire line of testimony here made plain that Clifford's conclusions were based on the exhibits and evidence theretofore presented in the trial and

the jury could not have been misled by the form of the questions. Moreover, Clifford was cross examined in exhaustive detail as to the assumptions on which his computation was based. If there lurked any residual doubt as to the basis of Clifford's computation after the direct examination none could have remained after the searching cross examination.

ARGUMENT

I

THE INDICTMENT WAS RETURNED BY A PROPERLY CONSTITUTED GRAND JURY WHICH HAD FULL AUTHORITY TO CHARGE THE DEFENDANTS WITH THE CRIMES SPECIFIED IN ALL FIVE COUNTS

The primary ground of reversal by the court below was that the order of February 28, 1940 extending the life of the grand jury into the March term was void and that therefore the indictment herein, returned on March 29, 1940, was void. Closely interwoven with that ground was the further partial ground that the indictment was void as to counts four and possibly five since those counts involved matters which the grand jury allegedly had no authority to investigate, even if it had been legally continued into the March term. We shall undertake to show that since the grand jury was properly continued into the March term, the indictment as a whole was returned by a legally constituted grand jury; and that the subject matter of counts four and five were within the scope of its investigatory powers. We shall also consider the related matters

dealing with the ruling on the preliminary motions and the holding of the court below that the Government had the burden of proving the allegations in the indictment as to the continuance of the grand jury.

A. THE UNDERLYING STATUTORY PROVISIONS AND THE ORDER OF FEBRUARY 28, 1940

The grand jury was impaneled at the December 1939 term of court, and therefore had authority to sit throughout the month of January, 1940.[13] During that term, by an order of undisputed validity that was entered January 24, 1940, the life of the grand jury was continued into the February term. Its existence was further continued into the March term by an order of February 28, 1940, and the indictment was returned on March 29, 1940. The court below held that the second order of continuance was void under Section 421, Tit. 28, U. S. C. (Sec. 284, Judicial Code), and that the indictment was void since the grand jury had no authority to sit during the March term.

1. Section 421, Tit. 28, U. S. C. (Sec. 284, Judicial Code) in so far as material then provided:

> A district judge may, upon request of the district attorney or of the grand jury or on

[13] Pursuant to Section 79 of the Judicial Code (U. S. C., Tit. 28, Sec. 152), terms of court for the Eastern Division of the Northern District of Illinois are begun on the first Monday in February, March, April, May, June, July, September, October, and November, and on the third Monday in December.

> his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than three terms.

This sentence was added to the section in 1931. Traditionally, a grand jury's existence terminated at the end of the term of court during which it was impaneled, but even prior to the enactment of this provision it had been held that the district courts could authorize the grand jury to sit beyond the original term. *United States* v. *Rockefeller*, 221 Fed. 462 (S. D. N. Y.); *Elwell* v. *United States*, 275 Fed. 775 (C. C. A. 7th), certiorari denied, 257 U. S. 647; and *Johnson* v. *United States*, 5 F. (2d) 471 (C. C. A. 4th). The correctness of these decisions, however, was questioned, and beginning with 1923, there were regularly introduced in Congress bills authorizing extended sittings for the purpose of permitting the completion by a single grand jury of important investigations, particularly of anti-trust investigations. S. Rep. No. 1189, 67th Cong., 4th Sess.; H. Rep. No. 366, 68th Cong., 1st Sess.; S. Rep. No. 1401, 70th Cong., 2d Sess. The bills as introduced used the phrase "business unfinished" rather than the word "investigations" as added by the Senate and finally enacted in 1931. This amendment was stated in the Senate Committee Report to be simply a clarifying

one. S. Rep. No. 877, 71st Cong., 2d Sess. In 1940 the sentence in question was amended to extend the period during which the grand jury could sit from three terms to eighteen months in order to permit the conclusion by a single grand jury of complex investigations in judicial districts in which the term was limited to a month's duration. H. Rep. No. 1757, 76th Cong., 3d Sess. No express reason for the limitation on extended sittings to "investigations" begun at the preceding term appears in the legislative history, but the history outlined and the general purpose of the entire provision make clear that the purpose was to limit the grand jury to the general subject matter already under consideration and to prevent it from continuing to sit for ordinary unrelated matters.

2. The disputed order of February 28, 1940 reads as follows (1 R. 28–29):

> Now comes the Second December Term 1939 Grand Jury for the Northern District of Illinois, Eastern Division, by Dorothy W. Binder, Forewoman, and in open Court requests that an order be entered authorizing them, the said Second December, 1939 Grand Jury, heretofore authorized to sit during the February 1940 Term of this Court, to continue to sit during the Term of Court succeeding the said February Term of Court, to-wit, the March 1940 Term of Court, to finish investigations begun but not finished by said Grand Jury during the said December 1939 and the said February 1940

> Terms of this Court, and which said investigations cannot be finished during the said February 1940 Term of Court; and the Court being fully advised in the premises,
>
> It Is Therefore Ordered That the Second December 1939 Grand Jury, now sitting in this Division and District, be, and it is hereby authorized to continue to sit during the March 1940 Term of Court for the purpose of finishing said investigations.

The majority of the court below held that this order was invalid since it authorized the grand jury to sit during March for the purpose of finishing investigations begun in February, whereas under the statute, it could be authorized only to finish investigations began during its original term, i. e., the December 1939 Term.

We submit that, fairly construed, the order never contemplated that any new investigations had been begun in February that were to be continued into March; that no new investigations had in fact been begun in February; that neither respondents nor the court below have even suggested that any new investigations were begun in February; and that, as disclosed by the preamble to the indictment, the grand jury itself understood its authority as extending only to finish the investigations begun at the December 1939 term, its original term.

The first order of continuance empowered the grand jury to sit during the February term to finish investigations begun in the December term. The order is of undisputed validity, and under it

the grand jury had no authority to commence any new investigations in February. Moreover, there is no suggestion that the grand jury in fact undertook new investigations in February, thereby exceeding its authority under the first order. That the investigations [14] in question were begun during the original December term is affirmatively disclosed in this record (3 R. 614–692), as well as in *United States* v. *Brown*, 116 F. (2d) 455, 456 (C. C. A. 7th), which involved a contempt proceeding against one of the respondents herein with respect to testimony before this very grand jury, and which revealed that the investigations leading up to the indictment herein were commenced during the December term.

It is in this setting that the February 28 order must be interpreted. The second paragraph of the order authorized the grand jury "to continue to sit during the March 1940 term of Court for the purpose of finishing said investigations." The reference to "said investigations" relates to the first paragraph in which the grand jury asks au-

[14] The contention that as to the fourth count (evasion of 1939 taxes and filing of false returns on March 15, 1940), the investigations could not possibly have been begun during the December 1939 term will be considered *infra*, pp. 34–36. We shall there show that the grand jury's general inquiry into Johnson's financial affairs was a single "investigation" within the meaning of the statute, so that it was not entering upon new fields when it considered Johnson's 1939 taxes. Moreover, whatever may be said of that count cannot affect the first three counts.

thority to continue to sit during the March term "to finish investigations begun but not finished by said Grand Jury during the said December 1939 and the said February 1940 terms of this Court, and which said investigations cannot be finished during the said February 1940 term of Court * * *." When considered against the background of the request for the extension, it is plain that neither the request nor the order contemplated that the grand jury would have any authority to go beyond the investigations already properly commenced in the December term and continued into the February term. That the grand jury so understood its authority is confirmed by the preamble to the indictment where it stated [15] (1 R. 2):

> The Grand Jurors * * * at the December Term * * * having begun but not finished during said December Term of Court among other thing an investigation of the matters charged in this indictment, and having continued to sit by order of this Court * * * during the February and

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[15] The requirement of secrecy of grand jury proceedings and the strong presumption of legality of grand jury action require that effect be given to the solemn statement of this grand jury in the indictment that it continued to sit during the February and March terms "for the purpose of finishing investigations begun but not finished during said December Term." (1 R. 2.) Cf. *Skidmore* v. *United States*, 123 F. (2d) 604 (C. C. A. 7th), certiorari denied, February 2, 1942, No. 813, this Term; *Reuben* v. *United States*, 86 F. (2d) 464 (C. C. A. 7th), certiorari denied, 300 U. S. 671; *Glasser* v. *United States*, Nos. 30–32 this Term, decided January 19, 1942.

> March Terms of said Court for the purpose of finishing investigations begun but not finished during said December Term of Court * * *.

Judge Evans, in his dissent, concluded that a fair reading of the order in its proper setting left no basis for attack upon its validity. He thus interpreted the disputed language, "during the December * * * and February Terms" as modifying the verb "finished" rather than the verb "begun", and read the verb "begun", in the circumstances surrounding the order, as meaning "theretofore begun" in the December term. Indeed, a comma placed after the word "begun" would probably go far towards removing any uncertainty in this respect.[16]

3. If it should be concluded, however, that there is doubt as to the meaning of the February 28 order as a result of its inartistic draftsmanship, or that it may conceivably be construed so as to have conferred excessive power upon the grand jury, then any such defect would be rendered harmless by Section 556, Title 18, U. S. C. (Section 1025 of the Revised Statutes) which reads as follows:

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[16] Comparison of the present order with orders held valid in similar circumstances points to its validity. For example, in *United States* v. *Parker*, 103 F. (2d) 857 (C. C. A. 3d), certiorari denied, 307 U. S. 642, an order extending the sitting of a grand jury was held valid although it provided simply that the grand jury remain in service until the further order of the court. See also *United States* v. *Borden Co.*, 28 F. Supp. 177 (N. D. Ill.), reversed in part on other grounds, 308 U. S. 188; *Johnson* v. *United States*, 5 F. (2d) 471 (C. C. A. 4th).

> No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, * * *.

Compare Section 269 of the Judicial Code (Sec. 391, Tit. 28, U. S. C.) which directs the Federal courts, in all cases, civil or criminal, to "give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties". See Appendix, *infra*, p. 60.

The Circuit Court of Appeals refused to apply Section 556, stating without further elaboration that "the question presented is one of substance and not of form" (1 R. 187), and citing *Crain* v. *United States*, 162 U. S. 625, which has been expressly overruled on this point. *Garland* v. *Washington*, 232 U. S. 642.[17]

The application of the foregoing statutory provisions is particularly appropriate here, where no prejudice whatever resulted to the defendants.

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[17] See also *Badders* v. *United States*, 240 U. S. 391, 395; *Berger* v. *United States*, 295 U. S. 78; *Breese* v. *United States*, 226 U. S. 1; *Rice* v. *United States*, 35 F. (2d) 689 (C. C. A. 2d); *United States* v. *Austin-Bagley Corp.*, 31 F. (2d) 229 (C. C. A. 2d); *Williams* v. *United States*, 275 Fed. 129 (C. C. A. 9th).

The February 28 order is attacked only because it allegedly authorized the grand jury to continue into March any investigations that it already illegally commenced in February. But neither respondents nor the court below have suggested that any such illegal investigations were commenced in February, and whatever excessive authority might otherwise be read into the February 28 order was plainly not utilized by the grand jury. The February 28 order was at most ambiguous, and exemplifies the clearest kind of "defect" which the foregoing statutory provisions were intended to cure.

Moreover, even if the February 28 order be construed to authorize the continuance of investigations begun at the February term, that excessive authorization was at best a nullity and there remained a valid order permitting the grand jury to finish during the March term the investigations which it had undertaken during the December term. The indictment herein was in fact the product of investigations commenced during the December term, and the alleged invalid portions of the February 28 order may be put aside as severable in accord with the familiar principle that judgments and orders may be sustained in so far as valid. Cf. *Semmes* v. *United States*, 91 U. S. 21; *Ballew* v. *United States*, 160 U. S. 187; *Connally* v. *Louisville & N. R. Co.*, 297 Fed. 180 (C. C. A. 5th), certiorari denied, 268 U. S. 693.

B. THE GRAND JURY HAD AUTHORITY TO RETURN COUNT FOUR AND FIVE. THE CHARGES WITH RESPECT TO JOHNSON'S 1939 TAXES GREW OUT OF THE SAME "INVESTIGATIONS" THAT PRODUCED THE CHARGES RELATING TO HIS EARLIER TAXES

The court held further that even if the February 28 order were not void and even if the grand jury were properly continued, counts four and possibly five were nevertheless void because, as to them, the grand jury had engaged in new investigations. In short, it held that the crimes relating to Johnson's 1939 taxes could not have been committed prior to the filing of Johnson's return on March 15, 1940, and that a new "investigation" was necessarily initiated during the March term in order to include the 1939 taxes within the indictment.[18] It held that in authorizing the continuance of a grand jury to finish "investigations" already begun, Section 284 of the Judicial Code, *supra*, pp. 25–26, used the word "investigations" as synonymous with offenses. (1 R. 186.) This interpretation of Section 284 with respect to Johnson's 1939 taxes permeated the court's entire treatment of the question of the legality of the indictment as a whole and of the propriety of the continued existence of the grand jury.

[18] Count four dealt with Johnson's evasion of his 1939 taxes, whereas count five charged a conspiracy with respect to his taxes for the years 1936–1939 inclusive. It may well be that count five is valid, even under the theory of the court below, for acts of the conspiracy charged even with respect to the 1939 taxes, occurred during the year 1939, prior to the February and March 1940 terms.

That unduly narrow interpretation of "investigations" is inconsistent with the firmly established concept of a grand jury's functions and powers. That its traditional functions involve a broad field of inquiry was graphically outlined by this Court in *Blair* v. *United States*, 250 U. S. 273, 282:

> It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.

See also *Hale* v. *Henkel*, 201 U. S. 43; *United States* v. *Thompson*, 251 U. S. 407; *Cobbledick* v. *United States*, 309 U. S. 323; *In re Black*, 47 F. (2d) 542 (C. C. A. 2d); *Shushan* v. *United States*, 117 F. (2d) 110 (C. C. A. 5th), certiorari denied, 313 U. S. 574.

The ruling of the court below substantially impedes the carrying out of an essential function of grand juries, the thorough investigation of complex cases. Under the court's ruling, to insure the legality of an indictment returned other than in the original term, the resulting indictments, including the precise issues and particular defendants, must be anticipated and preliminary investi-

gation begun during the original term as to each crime eventually charged. But, as vividly pointed out in Judge Evans' dissenting opinion (1 R. 207–208), a comprehensive investigation of an involved situation may ultimately reveal crimes wholly unanticipated at the beginning of the grand jury's deliberations. Plainly, Congress never intended to curtail the power of the grand jury to indict with respect to all crimes growing out of the central inquiry.

These considerations are particularly relevant here. The grand jury had undertaken an extensive investigation of the financial affairs and tax liability of Johnson. As the investigation progressed there appeared a pattern of conduct whereby persons other than Johnson posed as the owners of his gambling houses. The grand jury was led to believe that Johnson had received large amounts of unreported income from these enterprises. The pattern was a recurring one; it continued through the year 1939 as before, and that continuous conduct during the year 1939 finally culminated in the filing of the false return on March 15, 1940. Surely, this was no new field of inquiry. It was simply another aspect of the same "investigation" growing out of the same central set of facts.

C. THE RULING ON THE PRELIMINARY MOTIONS

The court further held that even if the second order of continuance were valid, Johnson's motion to quash and the other defendants' plea in abate-

ment alleged sufficient facts showing the failure of the grand jury to comply with the order so as to require the Government to answer and that, therefore, the overruling of the motion to quash and striking of the plea in abatement were reversible error. (1 R. 186–188.) The allegations on which the court relied were described by it as follows (1 R. 186):

> As pointed out, the motion as to the first, second, and third counts expressly averred, as a matter of fact, that the investigations of the offenses charged in those counts "were finished and concluded at the February 1940 Term of the Said Grand Jury," and as to counts four and five, the averment was made that the investigation as to offenses therein charged was not "begun at the December 1939 Term of court" and was "first begun at said March 1940 Term of court." * * *

These bare allegations are in substance the only allegations in the preliminary motions other than those relating to the validity of the order of continuance. The motion to quash contains a mere verification by the respondent Johnson that the allegations of fact therein contained are true. There also is a certification by one of his attorneys that he has read the indictment and the orders referred to and that from such examination he is of the opinion that the motion to quash is well founded in fact and in law. (1 R. 31.) The plea in abatement filed on behalf of the other respondents is signed by them, without verification of any kind. (1 R. 32–

35.) Neither the motion to quash nor the plea in abatement is supported by any separate affidavit or showing of facts. Both pleadings ask for judgment of the court quashing the indictment (1 R. 31, 35), and contain no offer of proof or request for opportunity to offer proof in support thereof.

The allegations as to the first three counts merely stated that the grand jury had already finished its investigations in the February term since it had returned indictments on these very matters on March 1, 1940. (1 R. 30, 34.) But the court below itself was satisfied that this contention did not raise any issue which could operate to the defendants' advantage even if the facts alleged are taken as true, for the court plainly stated (1 R. 185):

> While the return of an indictment might be an indication that the investigation was finished, we do not think it is conclusive. We see no reason why a Grand Jury is precluded from continuing an investigation after the return of an indictment, and subsequently again indict for the same offense.

As to the fourth and fifth counts, the preliminary motions alleged baldly that the investigations were begun in the March term. This was only an assertion of an ultimate conclusion of fact and no specific facts justifying the conclusion were alleged. The allegation stems from respondents' contention that since the 1939 returns were not filed until March 15, 1940 the investigations necessarily com-

menced during the March 1940 term. But, as we have shown *supra*, pp. 34–36, that conclusion rests upon an erroneous interpretation of the word "investigations", and therefore raises merely a question of law. At best, the preliminary motions alleged no specific facts but only ultimate conclusions. No allegations of fact from which prejudice might be inferred were made. Both are fundamental to the sufficiency of preliminary motions. *Hyde* v. *United States*, 225 U. S. 347; *Agnew* v. *United States*, 165 U. S. 36; *Shushan* v. *United States*, 117 F. (2d) 110 (C. C. A. 5th), certiorari denied, 313 U. S. 574; *United States* v. *Parker*, 103 F. (2d) 857 (C. C. A. 3d), certiorari denied, 307 U. S. 642; *Olmstead* v. *United States*, 19 F. (2d) 842 (C. C. A. 9th), affirmed, 277 U. S. 438. See also *United States* v. *McGuire*, 64 F. (2d) 485 (C. C. A. 2d), certiorari denied, 290 U. S. 645; *Colbeck* v. *United States*, 10 F. (2d) 401 (C. C. A. 7th), certiorari denied, *sub. nom. Hackethal* v. *United States*, 270 U. S. 663.[19]

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[19] The court's decision on the motion to quash likewise fails to give effect to the established principle that a motion to quash is largely addressed to the discretion of the trial court and will not be reviewed except on a showing of an abuse of discretion. *Durland* v. *United States*, 161 U. S. 306; *United States* v. *Hamilton*, 109 U. S. 63; *Sherman* v. *United States*, 80 F. (2d) 629 (C. C. A. 4th); *Sutton* v. *United States*, 79 F. (2d) 863 (C. C. A. 9th); *Hill* v. *United States*, 15 F. (2d) 14 (C. C. A. 8th).

Moreover, there is serious doubt whether the ruling of the District Court on the plea in abatement was reviewable at all by the Circuit Court of Appeals. Section 879, Title 28,

The ruling of the court below on the preliminary motions would seem to permit any defendant to question the propriety of the grand jury's proceedings simply by a bare allegation of a conclusion based only on guess and conceived in the absence of any knowledge of impropriety on the part of the grand jury. The court's ruling opens the door to dilatory tactics and hopeful delvings into grand jury proceedings, without conferring any compensating meritorious benefits upon the accused. The inevitable result would be unjustifiable delay, violation of the secrecy of grand jury proceedings and extensive fishing expeditions which have been so often condemned.

D. THE GOVERNMENT DOES NOT HAVE THE BURDEN OF PROVING ALLEGATIONS IN THE INDICTMENT AS TO THE CONTINUANCE OF THE GRAND JURY

The decision of the court below not only requires the Government to answer preliminary motions of

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U. S. C. (Section 1011, Revised Statutes) unambiguously provides:

> There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact.

And these provisions have been relied upon in at least three cases as a bar to appellate review of the trial court's rulings on pleas in abatement in criminal cases. *Mounday* v. *United States*, 225 Fed. 965 (C. C. A. 8th), certiorari denied, 239 U. S. 645; *Biemer* v. *United States*, 54 F. (2d) 1045 (C. C. A. 7th), certiorari denied, 286 U. S. 566; *Luxenberg* v. *United States*, 45 F. (2d) 497 (C. C. A. 4th), certiorari denied, 283 U. S. 820.

the nature here involved, but goes further and unconditionally imposes upon the Government the extraordinary burden of proving the formal allegations of the indictment as to the continuance of the grand jury. In the opinion of the court, "failure to prove the allegation with reference to the authority of the Grand Jury to act is likewise fatal". (1 R. 189.) If this be correct it is incumbent upon the Government to prove when the investigation as to each count of an indictment began, what information was before the grand jury at various times and whether its final actions were within the boundaries of the original investigation. The mere statement of this contention bears its own refutation. Proof of such matters should no more be required than proof that the grand jurors are qualified "Grand Jurors for the United States" or were "duly empaneled and sworn in the District Court", which also are preliminary averments of the indictment. (1 R. 2.)

Of course, if any of those formal allegations are properly attacked by the defendant prior to trial by appropriate preliminary motions containing specific allegations of fact that challenge those formal allegations of the indictment, then the defendant may be entitled to a preliminary hearing on those issues. But even in that situation the burden is upon the defendant to prove any alleged illegality of the grand jury proceedings. *Mulloney* v. *United States*, 79 F. (2d) 566 (C. C. A. 1st), certiorari denied, 296 U. S. 658; *Cravens* v.

United States, 62 F. (2d) 261 (C. C. A. 8th), certiorari denied, 289 U. S. 733. Cf. *Glasser* v. *United States*, Nos. 30–32, this Term, decided January 19, 1942.

The ruling of the court below, however, not only imposes the burden on the Government in that situation, but apparently goes much further. It seems to require the Government to prove those allegations at the trial on the merits, just as it must prove venue (1 R. 189), irrespective of whether the issue is raised by the defendant. Such a sweeping rule would be a radical departure from established practice, for it has long been settled that where no specific issue is raised as to the legality of the grand jury the customary formal allegation of the return of the indictment is conclusive, and the objection is to be regarded as waived. Cf. *United States* v. *Gale*, 109 U. S. 65; *Agnew* v. *United States*, 165 U. S. 36; *Powers* v. *United States*, 223 U. S. 303; *Hyde* v. *United States*, 225 U. S. 347; *Carroll* v. *United States*, 16 F. (2d) 951, 955 (C. C. A. 2d), certiorari denied, 273 U. S. 763.

The havoc which will be worked by the holding of the court below on this issue if unreversed, is readily apparent. It will place new and unnecessary obstacles in the way of nearly every prosecution, and will seriously impede the effective administration of the criminal laws.

II

THE AIDERS AND ABETTORS WERE PROPERLY CHARGED IN THE INDICTMENT AND THE EVIDENCE SUPPORTS THEIR CONVICTIONS

The indictment in each of the first four counts charged the respondent Johnson with wilful attempts to evade his income taxes for the calendar years 1936 to 1939, inclusive, and alleged as a means thereof that Johnson filed a false income tax return on March 15 of each succeeding year. Each count alleged as a further means of evasion that Johnson concealed his income, the sources of the income and his books reflecting the income and its sources. The first four counts further alleged that "during the calendar year * * * and up to and including March 15 [of the succeeding year] * * *, and continuously thereafter up to and including the date of the filing of this indictment, * * * [the other defendants] well knowing all the premises aforesaid, did unlawfully, feloniously, wilfully and knowingly did, abet, conceal,* induce, and procure * * * Johnson * * * to attempt in the manner aforesaid to evade and defeat the income tax aforesaid, * * * by the means

* The statutory language for aiding and abetting is "aids, abets, counsels, commands, induces or procures". (Sec. 332, Criminal Code; U. S. C., Title 18, Sec. 550.) It would appear that the pleader here intended to charge aiding and abetting in the statutory language and that the use of the word "conceal" in the indictment rather than the statutory word "counsel" was a clerical error.

and in the manner aforesaid, * * *". (1 R. 5–6, 9, 12–13, 16.)

The theory of the prosecution was that the respondents other than Johnson aided and abetted his attempted evasion of income taxes by operating gambling houses and a currency exchange in a manner so as to conceal Johnson's financial interest therein and his income therefrom, by failing to keep books and records of the gambling houses for the purpose of concealing Johnson's income, by converting the income of the houses into cash so that the income might be concealed, and by filing false personal income tax returns and social security tax returns for the same purpose. (1 R. 73–108.)

The Circuit Court of Appeals held that a demurrer to the first four counts of the indictment on behalf of the defendants other than Johnson, should have been sustained on the ground of inconsistency as well as duplicity. It held that each of those four counts was inconsistent in that Johnson was charged with a crime committed on March 15 of each year whereas the other defendants were charged with offenses extending over a period of years. (1 R. 191.) And it held further that each of those counts was duplicitous since the co-defendants were charged with conduct both before and after March 15 of each year and were therefore charged in the same count both as accessories before and after the fact. (1 R. 191–192.) The court also ruled that the co-defendants' motions for directed verdicts should have been

granted since it found that there was no evidence that the co-defendants had anything to do with the preparation of Johnson's returns. (1 R. 195–196.)

A. Underlying the various rulings of the court with respect to the co-defendants is its misconception of the crime that was charged against Johnson and its erroneous treatment of Section 332 of the Criminal Code dealing with aiders and abettors. It erroneously assumed that the first four counts simply charged Johnson with filing false returns on March 15 of each of the years involved. But Johnson was indicted under Section 145 (b) of the Revenue Acts of 1936, 1938, and the Internal Revenue Code, and the essence of the crime defined in Section 145 (b) is the attempt to evade income taxes in any manner, not merely by the filing of false returns. *United States* v. *Ragen*, Nos. 54–56, this Term, decided January 5, 1942; *Emmich* v. *United States*, 298 Fed. 5 (C. C. A. 6th), certiorari denied, 266 U. S. 608; *United States* v. *Miro*, 60 F. (2d) 58 (C. C. A. 2d). The filing of a false return is only one means of attempted evasion, which may mark the consummation of the crime in point of time. The attempt to evade may be in any manner and the crime may be committed as well by filing an amended return (*Levy* v. *United States*, 271 Fed. 942 (C. C. A. 2d)) or by wilfully failing to file any return (*United States* v. *Miro*, *supra*).

In these circumstances, it is plain that the aiders and abettors were not charged with offenses that

were inconsistent with the crimes attributed to the primary defendant. It was not necessary that they join with him in the very acts of preparing or filing the false returns. It was sufficient that they collaborated with him in a course of conduct that made possible the filing of those false returns. There was, therefore, no inconsistency, and for the same reason there was no basis for the directed verdict, since it was not necessary to prove that the co-defendants had participated in the actual preparation or filing of Johnson's returns.

The aiders and abettors were made principals by Section 332 of the Criminal Code (U. S. C., Tit. 18, Sec. 550), Appendix, *infra*, p. 60, and it is clear from the underlying theory of those provisions that the attempted tax evasion may be aided by acts other than assisting in the actual filing of the false returns. Thus in *Jin Fuey Moy* v. *United States*, 254 U. S. 189, this Court held that a doctor was guilty of abetting the illegal sale of narcotics, where he knowingly issued a prescription for the drug. To the same effect are *Silkworth* v. *United States*, 10 F. (2d) 711 (C. C. A. 2d), certiorari denied, 271 U. S. 664; *Reinstein* v. *United States*, 282 Fed. 214 (C. C. A. 2d), certiorari denied, 260 U. S. 722; *Collins* v. *United States*, 20 F. (2d) 574 (C. C. A. 8th); *Smith* v. *United States*, 24 F. (2d) 907 (C. C. A. 5th); *Johnson* v. *United States*, 62 F. (2d) 32 (C. C. A. 9th); *Schrader* v. *United States*, 94 F. (2d) 926 (C. C. A. 8th).

These decisions illustrate the universal interpretation of Section 332 that any act in furtherance of the criminal plan, however insignificant, made with the knowledge of and to carry out the criminal purpose, renders the actor an aider and abetter. Here the co-defendants knowingly performed numerous acts in furtherance of the criminal plan. The trial judge correctly instructed the jury as to the necessity for such conscious participation in the criminal plan on the part of the aiders and abetters (3 R. 1017) and the verdicts are fully supported by the evidence. See Statement, *supra*, pp. 4–10.

Acts constituting a crime and acts which aid and abet the crime together constitute but a single crime. *Skelly* v. *United States*, 76 F. (2d) 483 (C. C. A. 10th). Aiding and abetting does not constitute a separate offense apart from the crime committed by the principal actor. A reading of the instant indictment leaves no doubt that as to each of the substantive counts a single crime of attempted evasion was charged and that the consummation of the crime was alleged to have occurred upon the filing of the returns on March 15. The other dates or times alleged are simply the dates on which acts of aiding and abetting were committed. They are not times at which separate crimes were committed. As has been shown, an attempt to evade may be aided and abetted by acts committed at times other than the filing of the return, and

the substantive counts of the indictment are, therefore, not inconsistent.[21]

B. In ruling that a defendant may not be charged in the same count of an indictment as an accessory both before and after the fact, the court below has further misinterpreted Section 332 of the Criminal Code. Under this section a person who aids and abets the commission of a crime is declared to be a principal, and he is punishable as a principal. His continued participation in the criminal plan after the commission of the crime does not make him any the less a principal. Section 333 of the Criminal Code U. S. C., Title 18, Sec. 551, (Appendix, *infra*), providing a penalty for accessories after the fact of "one-half the longest term of imprisonment * * * prescribed for the punishment of the principal" can have no application. *Madigan* v. *United States*, 23 F. (2d) 180 (C. C. A. 8th). See also *Skelly* v. *United States, supra;* and cf. *Smith* v. *United States, supra; Collins* v. *United States, supra.*

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[21] Further it is established that the indictment need contain no charge as to aiding and abetting, but may charge the accessory directly as a principal. *Alexander* v. *United States*, 95 F. (2d) 873 (C. C. A. 8th), certiorari denied, 305 U. S. 637; *O'Brien* v. *United States*, 25 F. (2d) 90 (C. C. A. 7th). If aiding and abetting is alleged directly, the indictment need not allege the time of such aiding and abetting. *Barron* v. *United States*, 5 F. (2d) 799 (C. C. A. 1st); *Di Preta* v. *United States*, 270 Fed. 73 (C. C. A. 2d). Under these decisions an allegation of time of aiding and abetting becomes surplusage and as such may be disregarded. Cf. *Glasser* v. *United States*, Nos. 30–32, this Term, decided January 19, 1942; *Coffin* v. *United States*, 162 U. S. 664.

The instant indictment charges aiding and abetting continuously both before and after the commission of the crime. Given a proper interpretation of Section 332 and proper correlation of Sections 332 and 333, it is clear that the co-defendants are charged *only as principals* in single crimes and that there can be no duplicity. The prosecution did not rely upon Section 333 in any manner. Neither did the District Court in charging the jury or imposing sentence. At no point in the prosecution or trial of these cases was there any suggestion that the co-defendants were being prosecuted or tried as accessories after the fact, and the charge to the jury placed no such issue before it. Accordingly, even if there were a theoretical possibility of spelling out a philosophic duplicity in the first four counts, it never became a reality and the defendants were not prejudiced in any manner. Cf. *Berger* v. *United States*, 295 U. S. 78.

III

THE ENTIRE VERDICT AS TO THE RESPONDENT JOHNSON IS AMPLY SUPPORTED BY THE EVIDENCE

The Circuit Court of Appeals in reviewing the evidence noted that the prosecution proceeded on two theories; first, that Johnson was the owner of all of the gambling houses in question and was entitled to all of the income therefrom, and, second, that Johnson's expenditures during the years in question exceeded his prior available resources plus

his reported income. As to the ownership theory the court held that the evidence at best disclosed simply that Johnson had an interest in the gambling houses, that there was no proof that Johnson received all of the income of the houses and to charge him with income in excess of the amounts reported was to indulge in mere speculation. As to the expenditure theory, the court held that the evidence supported the verdict as to all counts except the first which involved the calendar year 1936. (1 R. 193–195.)

The evidence as hereinbefore outlined in the Statement, however, contains direct testimony of numerous acts of ownership and control of the gambling houses by Johnson. Income of the houses was sufficiently shown by the only possible means by records of banking and currency exchange transactions. The defendants who testified denied ownership in Johnson and controverted much of the testimony of Government witnesses. The defendants likewise introduced evidence to create an inference of ownership in others than Johnson. As a result there were created sharply defined issues of veracity of witnesses and weight of evidence. Such issues are for the jury to decide and the court below has improperly substituted its views on these questions for the views of the jury. *Burton* v. *United States*, 202 U. S. 344; *United States* v. *Brown*, 116 F. (2d) 455 (C. C. A. 7th); *United States* v. *Mann*, 108 F. (2d) 354 (C. C. A. 7th). As was pointed out by Judge

Evans, there was substantial evidence of Johnson's ownership of the gambling houses and the jury necessarily found that the income therefrom belonged to Johnson by virtue of that ownership. (1 R. 217–219.) Proof of ownership of a business is a sufficient basis from which to charge the owner with the income therefrom. *United States* v. *Wexler*, 79 F. (2d) 526 (C. C. A. 2d), certiorari denied, 297 U. S. 703.

Moreover, the court erred in assuming that the so-called "ownership" and "expenditure" theories were wholly independent of each other. They were not. Each gave suport to the other. The showing that Johnson had expended large amounts of money in excess of his stated resources fortified the conclusion that he was the owner of the gambling houses with which he had been identified. And the evidence of his participation in the affairs of the gambling houses made reasonable the conclusion that his large expenditures were made from income that was derived from his ownership of the gambling enterprises. Cf. *Gleckman* v. *United States*, 80 F. (2d) 394 (C. C. A. 8th), certiorari denied, 297 U. S. 709. It was therefore not fatal that the expenditures in 1936 did not exceed his admitted resources; for he may nevertheless be charged with having received income from the gambling houses, the ownership of which he unsuccessfully denied.

As to the fifth or conspiracy count, all members of the court below agreed that the evidence was

sufficient to present a jury question as to all defendants. (1 R. 196, 217–219.)

IV

THE EXAMINATION OF THE EXPERT WITNESS CLIFFORD WAS PROPER AND DID NOT CONSTITUTE REVERSIBLE ERROR

Frank J. Clifford, an Internal Revenue Agent, was called for the prosecution near the end of the Government's case and was qualified as an expert accountant. He first testified directly as to the results of his examination of Johnson's income tax returns and books and records and further as to statements of Johnson made to him during a number of interviews. (4 R. 5–10.) A list of exhibits in evidence was then enumerated by the examining attorney and Clifford was asked as to a computation of Johnson's expenditures during the years in question. (4 R. 13–14.) Thereafter the following transpired (4 R. 15):

> Mr. HURLEY. Q. Now, Mr. Clifford, with the exhibits just a moment ago enumerated, and the other evidence in the record, have you made a computation to determine the total amount of gross income of the defendant Johnson for the calendar year 1936?
>
> * * * * *
>
> The WITNESS. A. Yes.
>
> Q. What is the amount, from your computation, of the gross income of the defendant

Johnson for the calendar year 1936, according to your computation?

* * * * *

[Objection.]

The COURT. You are making reference to those exhibits and the evidence in the record?

Mr. HURLEY. He used those as a basis for his computation.

* * * * *

The WITNESS. A. $547,942.38.

(The witness next explained that the amount given was net and not gross income.)

The examiner then asked the following questions (4 R. 16):

Q. Are you able to state the amount of tax still due by the defendant Johnson to the United States for the calendar year 1936, after allowing credit for the amount of tax shown on defendant's tax return for the year as shown by Government's Exhibit R–10, in evidence?

A. Yes, sir.

Q. And what is the total amount of tax still due the United States, according to your computation, for the year 1936?

Objection was again made and overruled and the witness gave an amount in reply to the last question. (4 R. 16.) Identical questions were then asked as to each of the years 1937, 1938 and 1939. At the end of this interrogation the witness was cross examined in exhaustive detail concerning the

assumptions on which his computation was based. (4 R. 18–45, 46–52.)

The Circuit Court of Appeals held that the questions above quoted did not contain any assumption or hypothesis, that the testimony amounted to a weighing of controverted issues and hence invaded the province of the jury and that it was so prejudicial as to require a reversal.[22] (1 R. 198–200.)

The foundation for the use of hypothetical questions is simply that the premises used by the witness as the basis of his conclusion be expressly stated, so that the jury may reject the conclusion if it finds that the premises are not true. II Wigmore on Evidence (3d ed.), Sec. 672. The form and scope of the hypothetical question, including the particularization of the premises used, rest largely with the discretion of the trial court. *Travelers Ins. Co.* v. *Drake*, 89 F. (2d) 47 (C. C. A. 9th); *Metropolitan Life Ins. Co.* v. *Armstrong*, 85 F. (2d) 187 (C. C. A. 8th); *New York Life Ins. Co.* v. *Doerksen*, 75 F. (2d) 96 (C. C. A. 10th); *Guzik* v. *United States*, 54 F. (2d) 618 (C. C. A. 7th), certiorari denied, 285 U. S. 545; II Wigmore, *supra*, Secs. 681, 683. The one fixed requirement of the form of the question is that the jury shall

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[22] The court also appeared to stress the fact that many of Clifford's statements were "volunteered" and were not made in response to questions. (1 R. 198–200.) Its error in this respect was called to its attention in a petition for rehearing, and it thereafter corrected its opinion without, however, altering its ultimate conclusions. (1 R. 231.)

not be misled as to the premises used. "The question need only be substantially, not in exact form, hypothetical." II Wigmore, *supra*, Sec. 683, p. 811. There is no magic in the use of the word "assume".

The witness here was asked for a computation based on specified exhibits and the evidence in the record. The exhibits named contained almost all of the evidence as to amounts of income. The other evidence in the record at the time of the examination in question was that of the prosecution and consisted almost solely of testimony directed toward showing that Johnson was the owner of the various gambling houses. The witness' testimony here was simply an arithmetical computation made on the assumption that certain items were Johnson's income. *Cf. Guzik* v. *United States, supra.* As was pointed out in the dissenting opinion (1 R. 215–216), the entire line of testimony made unmistakably clear that Clifford's conclusions were based on the exhibits and the evidence theretofore presented in the trial and the jury could not possibly have been misled by the form of the questions. The trial judge expressly asked for the premises upon which the requested computation was to be based (4 R. 15) and his action thereafter in permitting the examination would hardly appear to amount to an abuse of discretion.

The alleged vice in Clifford's testimony is that it attributed to Johnson items of income on which the evidence was conflicting. Thus the court and the respondents both assert that the witness has thereby decided controverted issues which are for the jury to decide. But it has heretofore appeared to be unquestioned, and necessarily so, that an expert may be asked for an opinion which is based only on evidence presented by the proponent and that the question need not include premises based on facts or theories presented by the opponent. *Metropolitan Life Ins. Co.* v. *Armstrong, supra; New York Life Ins. Co.* v. *Doerksen, supra; Guzik* v. *United States, supra; Dunagan* v. *Appalachian Power Co.*, 33 F. (2d) 876 (C. C. A. 4th), certiorari denied, 280 U. S. 606; *Laughlin* v. *Christensen*, 1 F. (2d) 215 (C. C. A. 8th); *City of Port Washington* v. *Thacker*, 245 Fed. 94 (C. C. A. 7th); II Wigmore, *supra*, Sec. 682. This is all that has occurred here; Clifford in making his computation has assumed facts constituting the Government's theory of the case and has not used the respondents' theory as his basis. This is in essence the objection of the respondents. They make no contention, and indeed could make none, that there is no evidence in the record on which Clifford's assumptions were based. No more is required of a hypothetical question. *Travelers Ins. Co.* v. *Drake, supra.*

The fallacious cliché, adopted in the opinion below, that the testimony of the expert witness invades the province of the jury has been sharply criticized. II Wigmore, *supra*, Sec. 673. *Cf. Guzik* v. *United States, supra; Dunagan* v. *Appalachian Power Co., supra; New York Cent. R. Co.* v. *Johnson*, 27 F. (2d) 699 (C. C. A. 8th), reversed on other grounds, 279 U. S. 310. As Wigmore points out, the witness could not usurp the jury's function if he would, for the jury may reject the witness' premises and thereby reject his conclusion, or may simply reject his conclusion. The jury here was carefully instructed that it was the sole judge of the facts, of the credibility of witnesses, of the weight to be given testimony, of the intent of the defendants, and of guilt and innocence. (3 R. 1005–1022.) It would be absurd to assume that any of the jurors were for a moment in the least doubt that they were the ones who were to decide the controverted issues of fact. The respondents' contention that Clifford's testimony invaded the province of the jury and that it amounted to trial by a Government agent, should be contrasted with the fact that they themselves called an expert accountant and asked for and secured his computation based on their theory of the case. (3 R. 991–995.)

If the jury entertained any residual doubt as to the hypothetical character of Clifford's testimony, that doubt completely vanished during his cross

examination. Clifford was asked on cross examination if in making his computation he assumed as true all the evidence offered by the prosecution. (4 R. 19–20.) He was asked if he assumed that Johnson owned the various named gambling houses. (4 R. 37–41.) He was asked item by item whether he assumed that each was income to Johnson. (4 R. 24–34.) He was asked on what sources of information he based his computation and in individual detail on what evidence he based the assumptions as to the items of income. (4 R. 34–41.) Finally, Clifford was asked in detail as to the deductions and adjustments which he had taken into account in making his computation. (4 R. 46–52.)

Since the pivotal consideration was whether the jury was misled by Clifford's testimony, the court below plainly erred in holding that it was "not necessary to refer to his cross-examination in determining the propriety of his examination in chief." (1 R. 199.) If any doubt could have remained in a juror's mind as to the basis for Clifford's computation after his direct examination, it became an utter impossibility that the doubt could have remained after the searching cross examination. *Cf. United States* v. *Sessin*, 84 F. (2d) 667 (C. C. A. 10th); *Virginia Beach Bus Line* v. *Campbell*, 73 F. (2d) 97 (C. C. A. 4th), certiorari denied, 294 U. S. 727; *Dunagan* v. *Appalachian Power Co.*, *supra*. See also *United States* v. *White*, 124 F. (2d) 181, 186 (C. C. A. 2d).

CONCLUSION

The judgments of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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MARCH, 1942.

APPENDIX

Criminal Code:

> SEC. 332. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures, its commission, is a principal. (U. S. C., Title 18, Sec. 550.)
>
> SEC. 333. Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years. (U. S. C., Title 18, Sec. 551.)

Judicial Code:

> SEC. 269. * * * On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. (U. S. C., Title 28, Sec. 391.)

SEC. 284. * * * A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than three terms. * * * (U. S. C. Supp. V, Title 28, Sec. 421.)

Revenue Act of 1936, c. 690, 49 Stat. 1648, 1703:

SEC. 145. PENALTIES.

* * * * *

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title ~~of~~ or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Revenue Act of 1938, c. 289, 52 Stat. 447, 513:

Section 145 (b) is identical with Section 145 (b) of the Revenue Act of 1936, *supra*.

Revised Statutes:

SEC. 1025. [as amended by Act of May 18, 1933, c. 31, 48 Stat. 58]: No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon

be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, or by reason of the attendance before the grand jury during the taking of testimony of one or more clerks or stenographers employed in a clerical capacity to assist the district attorney or other counsel for the Government who shall, in that connection, be deemed to be persons acting for and on behalf of the United States in an official capacity and function. (U. S. C., Title 18, Sec. 556.)

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